

Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)
)
Amendment of the Commission's)
Rules To Preempt State and Local)
Regulation of Tower Siting For)
Commercial Mobile Services Providers)

RM - 8577

To: The Commission

DOCKET FILE COPY ORIGINAL

**REPLY COMMENTS OF McCaw Cellular Communications, Inc.
IN SUPPORT OF PETITION FOR RULE MAKING**

McCaw Cellular Communications, Inc. ("McCaw"),^{1/} by its counsel and pursuant to Sections 1.405 and 1.04 of the Commission's rules, hereby submits these reply comments in support of the Petition for Rule Making filed by the Cellular Telecommunications Industry Association ("CTIA") on December 22, 1994.

Introduction and Summary

CTIA has petitioned the Commission to initiate a rule making to consider preempting state and local cell-siting restrictions that have the purpose or effect of prohibiting, unduly impeding or increasing the costs associated with the placement, construction, modification and operation of facilities for the provision of commercial mobile radio services ("CMRS"). In support of CTIA's Petition, McCaw and other commenters have provided substantial evidence that there exists a clear and

^{1/} McCaw is a wholly-owned subsidiary of AT&T Corp.

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present need for federal action to address the growing patchwork of state and local cell-siting restrictions that are threatening the continued vitality and development of CMRS services. In view of this evidence, the Commission should act swiftly to establish Federal guidelines that strike a reasonable balance between the legitimate exercise of state and local land use authority on the one hand, and the countervailing public interest in the development of an efficient, ubiquitous and economical national wireless telecommunications infrastructure.

Contrary to the arguments made by some commenters, the Commission has the legal authority to preempt state and local regulations that frustrate the important Federal interest in ensuring the growth of wireless communications services. Similarly, there is no merit to the claims made by commenters that the initiation of a rule making would eliminate the rights of state and local authorities to reasonably regulate the siting of CMRS towers. The Commission should commence a rule making promptly to develop uniform Federal guidelines that respect both the reasonable needs of state and local authorities to address local land use issues, and the legitimate needs of carriers to site CMRS facilities that are essential to the provision of efficient, reliable and ubiquitous wireless communications services.

I. There is Abundant Evidence of an Immediate Need for FCC Action to Adopt Federal Cell-Siting Guidelines

Without exception, commenting CMRS providers agree that there exists a critical need for FCC action to preempt unduly

restrictive state and local cell-siting regulations. McCaw and others have provided a wealth of information in support of CTIA's petition to show that disparate, burdensome state and local cell-siting restrictions are a significant nationwide problem that is frustrating the deployment of new and improved commercial mobile services and increasing the costs to the public of receiving those services.^{2/} Examples supplied by numerous commenting parties show that burdensome cell-siting constraints arise in many forms, including construction moratoria and similar restrictions that flatly prohibit cell-siting;^{3/} regulations that dictate where facilities can be placed without regard to coverage needs;^{4/} design and operating requirements that impede the provision of service;^{5/} fee obligations that are unrelated to legitimate state/local permitting costs;^{6/} and redundant, subjective, often antiquated, and time consuming approval

^{2/} See, e.g., Comments of McCaw at 11-19 and Exhibit 1; Comments of American Personal Communications ("APC") at 2-5; Comments of Cellular Communications of Puerto Rico, Inc. ("CCPR") at 2-4; Comments of Nynex Mobile Communications Company ("Nynex") at 5-7; Comments of Nextel Communications, Inc. ("Nextel") at 3-4; Comments of Vanguard Cellular Systems, Inc. ("Vanguard") at 2-5.

^{3/} See, e.g., Comments of McCaw at 11-12, 15; Comments of APC at 4; Comments of Nynex at 5-6; Comments of Southwestern Bell Mobile Systems, Inc. at 10.

^{4/} See, e.g., Comments of Sprint at 7-9.

^{5/} See, e.g., Comments of Nynex at 5-6; Comments of The Personal Communications Industry Association ("PCIA") at 4-5.

^{6/} See, e.g., Comments of PCIA at 5.

processes that frequently generate arbitrary determinations and almost always add substantial expense and delay.^{7/}

Several parties have identified specific forms of state and local cell siting regulations that the Commission should consider preempting as part of a rule making proceeding. They include, for example, regulations that ban completely the construction of CMRS towers;^{8/} regulations that impose aesthetic requirements in areas zoned for industrial or similar use;^{9/} requirements that seek to extract "in kind" or other monetary concessions from CMRS providers;^{10/} and regulations concerning antenna structures relating to the safety of aircraft navigation.^{11/} Other participants have suggested that the FCC consider adopting procedures to expedite and resolve cell-siting disputes.^{12/} These and other proposals unquestionably merit further Commission

^{7/} See, e.g., Comments of APC at 2-5; Comments of Frontier Cellular Holding, Inc. ("Frontier") at 7-10; Comments of Nynex at Attachment 1; Comments of Southwestern Bell Mobile Systems, Inc. ("Southwestern Bell") at 10-14; Comments of Sprint at 3-9; Comments of United States Cellular Corporation ("USCC") at 4-9; Comments of CCPR at 2-3.

^{8/} See, e.g., Comments of McCaw at 11-13.

^{9/} See, e.g., Comments of Paging Network, Inc. ("PageNet") at 6.

^{10/} See, e.g., Comments of USCC at 9-10.

^{11/} See, e.g., Comments of PageNet at 3-4 (recognizing that the field of antenna structure regulation in regard to air navigation is completely occupied by stringently enforced FAA and FCC regulations); but cf., Letter of Aircraft Owners and Pilots Association at 1-3 (asserting that FAA air hazard determinations recognize the right of states and localities to control the use of property below navigable air space).

^{12/} See, e.g., Comments of Nextel at 7.

consideration in the context of a rule making to ensure that CMRS providers are afforded adequate protections in locating and obtaining necessary cell-siting authorizations. The Commission's overarching objective in this regard should be to develop rules which ensure that state and local cell-siting restrictions do not prohibit or unduly delay the deployment or operation of CMRS facilities; impose undue costs, surcharges or expense; or prohibit or have the effect of prohibiting the provision of service at the operator's chosen level of coverage and quality.

II. The FCC has Ample Authority to Preempt State and Local Cell-Siting Regulations that Impede Federal Objectives

There is no merit to the argument made by some commenters that the FCC lacks authority to preempt overly restrictive state and local cell-siting requirements that prevent or unduly hinder the introduction and development of CMRS services. CTIA and other commenting parties have convincingly shown that Section 332 of the Communications Act evinces a clear Congressional desire for the Commission to foster the development of the nation's wireless telecommunications infrastructure by removing disparate, burdensome state and local regulations that directly or indirectly hinder the growth of competitive, efficient and economical CMRS services.

Even without regard to the mandate of Section 332, the Commission has not only the power, but an obligation to preempt state and local regulations that stand "as an obstacle to the accomplishment and execution of the full objectives of

Congress."^{13/} The Act vests in the Commission broad authority to promulgate rules, regulations and orders in furtherance of this mission.^{14/} Unquestionably, there is a substantial Federal interest in ensuring the continued growth and development of wireless telecommunications services, which Congress has expressly recognized "operate without regard to state lines as an integral part of the national telecommunications infrastructure."^{15/} Restrictive state and local cell-siting constraints that obstruct the speedy, efficient and economical provision of CMRS services thwart this vital Federal goal and warrant swift Commission action. The Commission's preemption of state and local regulations impeding the interstate operation of receive-only earth stations and amateur radio facilities provides ample precedent for similar Federal action to ensure the growth and development of CMRS services.^{16/}

III. The Requested Rule Making Would Not Abolish State and Local Zoning Rights

McCaw is sensitive to the concerns expressed by commenters who assert that state and local authorities must not be proscribed from addressing land use issues that legitimately

^{13/} Louisiana Public Service Commission v. FCC, 476 U.S. 355, 368-69 (1986).

^{14/} See 47 U.S.C. § 154(i).

^{15/} See Comments of McCaw at 8.

^{16/} See, e.g., Comments of APC at 5-6; Comments of PCIA at 7-9; Comments of Encompass, Inc. at 2-4; Comments of Nynex at 4; Comments of Southwestern Bell at 6-7.

involve the public health, safety or welfare of their communities.^{17/} McCaw and its employees live and work in cities and towns that would be affected by preemption of burdensome cell-siting restrictions. As users of wireless services, McCaw's employees recognize that wireless services enhance the safety and welfare of people who live in those communities. Certainly, states and localities have a well-recognized and legitimate interest in regulating local land usage issues for the public good. However, there must be a reasonable balance struck between the appropriate exercise of such authority and the important Federal interest in ensuring the development of the nation's telecommunications infrastructure. Unfounded, arbitrary, and politically expedient regulatory actions should not be permitted to foil the deployment of cell-sites critical to the delivery of wireless services that enhance personal safety, productivity and the emergency response capabilities of the community.

Critics of CTIA's petition are mistaken in assuming that initiation of the requested rule making would automatically eviscerate state and local rights to regulate land use issues. The issuance of a notice of proposed rule making would not eliminate state and local cell-site regulations. Rather, a rule making would merely begin the process of soliciting further public comment leading to the development of a more complete

^{17/} See, e.g., Letter of Kale Brown at 1; Letter of R. James Pidduck at 1; Letter of Berkshire-Littlefield Environmental Council, Inc. at 1; Letter of Stamford Department of Health at 1-2; Letter of Westgate Residents for the Preservation of Their Neighborhood at 1.

record concerning the nature, scope and impact of state and local cell-siting restrictions, and the need for uniform federal cell-siting guidelines to ensure that the exercise of state and local authority does not impede the development of a nationwide wireless communications infrastructure. As part of this process, interested persons would have ample opportunity to participate in crafting appropriate guidelines.^{18/} Granting CTIA's request for a rule making will not deprive state and local authorities of their ability to regulate the siting of CMRS facilities. The concerns expressed to the contrary are entirely unfounded and should be rejected.

Conclusion

For the foregoing reasons, McCaw respectfully urges the Commission to issue a Notice of Proposed Rule Making promptly, and to adopt rules preempting state and local regulatory actions that have the purpose or effect of preventing or unreasonably delaying the deployment or operation of cell-site facilities; that impose undue costs, surcharges or expenses in connection with such facilities; or that directly or indirectly prohibit the

^{18/} See 47 C.F.R. § 1.415.

provision of service at the carrier's chosen level of coverage and quality.

Respectfully submitted,

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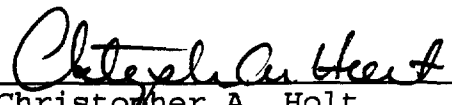
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